A

ONG SAW YONG & ORS v. MENTERI DI JABATAN PERDANA MENTERI (PARLIMEN DAN UNDANG-UNDANG) & ANOR

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN JC
B [ORIGINATING SUMMONS NO: AB-24NCVC-240-11-2022]
3 JUNE 2024

Abstract – *The amendments to the Courts of Judicature Act 1964, through the Courts of Judicature (Amendment) Act 2022, do not infringe an appellant's fundamental rights to appeal and their freedom of expression. Appellants/litigants do not have an inherent right to appeal interlocutory orders, and the amendments do not prevent appeals against final orders nor do they violate arts. 5 or 10 of the Federal Constitution. Moreover, the legislative process for enacting the amendments is proper.*

D

CONSTITUTIONAL LAW: *Courts – Appeal – Right to appeal – Amendments to Courts of Judicature Act 1964 ('CJA') – Whether amendments to CJA ultra vires Federal Constitution – Whether Parliament had exceeded powers – Whether amendments had curtailed freedom of expression – Whether litigants had no right to appeal – Whether amendments discriminatory in nature – Whether there had been clear transgression of constitutional principles in enactment of Courts of Judicature (Amendment) Act 2022*

The plaintiffs filed this originating summons ('encl. 1') due to the dismissal of their application under O. 18 r. 19 of the Rules of Court 2012 ('ROC') to extricate themselves from a civil suit. The civil suit arose out of the alleged breach of payment promised by the sixth defendant to the plaintiff under a memorandum of agreement and for the guarantee given by the first defendant to the plaintiffs under the letter of guarantee. The first, second and sixth defendants had applied to strike out the plaintiffs' writ and statement of claim ('encl. 5'). Meanwhile, the plaintiffs filed, in encl. 22, an application for summary judgment under O. 14 of the ROC against the first to sixth defendants to recover the whole or part of the amount of RM9,615,000 ('amount'), purportedly owed to the plaintiff. The said amount, which included interest, was in respect of the purchase price of a piece of land owned by the plaintiff that was sold to the sixth defendant under a sale and purchase agreement. Enclosures 5 and 22 were dismissed. Both parties appealed against the decisions but the matters had been struck off due to the amendments to s. 68 of the Courts of Judicature Act 1964 ('CJA'). Hence, the present encl. 1 where the plaintiffs submitted, *inter alia*, (i) the amendments to the CJA were *ultra vires* the Federal Constitution ('FC') where Parliament had exceeded its powers under arts. 10 to 10(2)(a). The amendments were for the convenience of the courts but had curtailed the

freedom of expression. Pursuant to the amendments, the litigants had no right to appeal and further, they were discriminatory in nature; (ii) the litigants' personal liberty and freedom of expression had been clearly restricted by the amendments to ss. 28(1) and 68(1) of the CJA which contradicted arts. 5 and 10 of the FC. Any law enacted could not deny the right of the public to access to justice, including the right to appeal (freedom of expression) against a court's decision that the public was dissatisfied with as, otherwise, curtailing such right would be unconstitutional; and (iii) the court ought to annul any amendment made without proper consideration of the rights provided by the FC and to provide justice to the public, especially the plaintiffs in this case.

Held (dismissing encl. 1):

(1) The plaintiffs obviously failed to understand and appreciate the purpose of the amendments. The defendants had given the justification for the amendments to the CJA and the constitutionality thereof. The affidavit in reply by the former Chief Registrar of the Federal Court did not need to be very lengthy when the issues to be responded to had been sufficiently explained in encl. 3 where stakeholders' inputs, including the Bar Council's, had been obtained, which the plaintiffs were bound to by its rulings and decisions. The justification was further reinforced in encl. 5. The reply in encl. 5 in para. 6 clarified that the Rules Committee formed under s. 17 of the CJA only stated their policy decision in regard to the proposed amendments. This was later brought up to the relevant Minister in the Prime Minister's Department for consideration and then on to the Cabinet which approved for the amendments to be debated/legislated in Parliament. The Amendment Bill was debated and approved by Parliament and not the Rules Committee or the Judiciary *per se*. To answer the plaintiffs' question on the capacity of the former Chief Registrar of the Federal Court, who deposed the defendants' affidavit, a person holding that position would be the best person to give evidence for the defendants on this issue. (paras 29, 31 & 33)

(2) An appellant would not be prejudiced as its right to appeal and right to be heard at trial remained intact. However, a grave injustice would ensue when there is deprivation of the right to appeal against a decision of the High Court after full trial. In regard to the position of a plaintiff whose case was struck off, or a defendant upon whom a summary judgment or judgment in default was entered, they have the right to appeal that decision because such decisions would have the effect of totally ending the claim. The trial would not proceed and the judgment is final. There would be discrimination if Parliament was to legislate that there be no right to appeal against the summary judgment, striking out and judgment in default orders granted by the original court.

Therefore, the plaintiffs' argument that they had been discriminated against had no standing in view of the policy decision behind the amendments' enactment. (para 35)

(3) The plaintiffs did not, at all material times, raise any challenge against the legislative procedure in the enactment of the Courts of Judicature (Amendment) Act 2022 ('Act A1661'). Moreover, the plaintiffs admitted that their challenge only revolved around the contention that the amendments to ss. 28 and 68 of the CJA were unconstitutional as stated in the plaintiffs' affidavit in reply. Hence, there was no procedural error(s) in the enactment of Act A1661 as a valid law. The plaintiffs' application in encl. 1 must be dismissed as the plaintiffs had not been able to satisfy the art. 8(1) test. (paras 46 & 53)

(4) The impugned provisions (amendments) did not in any way infringe on the plaintiffs' fundamental right as they had not acquired a right to appeal to begin with in regard to the interlocutory application in the nature of a striking out of a writing of pleadings. (para 57)

(5) The plaintiffs were unable to prove that the relevant provisions in art. 10 had been violated by the 2022 amendments to the CJA. Following the precedents of the Federal Court, art. 5(1) of the FC had not been violated by the Act A1661. The plaintiffs' argument premised on art. 5(1) of the FC was misconceived. Even if the meaning of the 'right to livelihood' was given a generous construction, these rights although fundamental, were subject to restriction on the grounds as set out in the FC. Therefore, the plaintiffs' claim also failed. (para 61)

(6) The plaintiffs failed to prove that there had been a clear transgression of constitutional principles in the enactment of the Act A1661. (para 65)

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Azinal Sdn Bhd v. Jannath Gani & Ors And Other Appeals [2024] 4 CLJ 335 CA ***(refd)***

Christopher Bandi v Tumbung Nakis & Anor; Jamil Sindi (Third Party) [2016] 4 CLJ 831 CA ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***

Datuk Hj Harun Hj Idris & Ors v. PP [1977] CLJU 24; [1977] 1 LNS 24 FC ***(refd)***

Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***

Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd [2019] 4 CLJ 131 FC ***(refd)***

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***

Mark Koding v. PP [1982] CLJU 15; [1982] 1 LNS 15 FC ***(refd)***

Mohd Najib Hj Abd Razak v. Government Of Malaysia & Another Appeal [2023] 10 CLJ 329 FC ***(refd)***

Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar [2024] 4 CLJ 353 CA ***(refd)***
OCBC Bank (Malaysia) Bhd v. Yong Hong Development Sdn Bhd & Ors [2021] CLJU 1176; [2021] 1 LNS 1176 HC ***(refd)***
Pasir Bogak Indah Sdn Bhd & Ors v. Ong Chin Wei & Ors [2022] CLJU 2643; [2022] 1 LNS 2643 HC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Teek v. President [2015] LRC 508 ***(refd)***
Wan Sagar Wan Embong v. Harun Taib [2008] 5 CLJ 14 FC ***(refd)***
Wong Shee Kai v. Government Of Malaysia [2022] 10 CLJ 1 FC ***(refd)***
Zulkifli Ibrahim v. Dewan Undangan Negeri Pulau Pinang & Anor [2022] CLJU 1683; [2022] 1 LNS 1683 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 17, 28(1), 67(1), 68(1)(e), (f), (g), 84
Courts of Judicature (Amendment) Act 2022, ss. 2, 8, 68(1)
Federal Constitution, arts. 2, 4, 5(1), 8(1), 10(1)(a), (2)(a), 121, 128(1)(a), 162(6), (7)
Income Tax Act 1967, s. 106(3)
National Land Code, Fifteenth Schedule para 5
Pengurusan Danaharta Nasional Berhad Act 1998, ss. 57, 72
Rules of Court 2012, O. 14, O. 18 r. 19

For the plaintiff - T Manoharan & Muhammad Wafi Abdullah; M/s Ong & Partners
For the defendants - Ahmad Hanir Hambaly; SFC & Liyana Muhammad Fuad; FC

Reported by Lina E

JUDGMENT

Noor Ruwena Md Nurdin JC:

Background

[1] The court heard this originating summons (encl. 1) filed by the plaintiffs dated 30 November 2022 on 27 February 2024, and reserved decision to 4 April 2024 wherein the court dismissed it with costs. Dissatisfied with the court's decision, the plaintiffs have filed a notice of appeal to the Court of Appeal (CoA) on 8 April 2024. This grounds of judgment contains the court's reasons in dismissing the application. The parties are referred to as per the hearing in the High Court (HC).

[2] The reliefs sought in encl. 1 were as follows:

1) Suatu Deklarasi bahawa pindaan kepada Seksyen 28(1) Akta Mahkamah Kehakiman 1964 [Akta 91] dengan meminda Sub-seksyen (1) dan memasukkan Perenggan (b), (c), dan (d) menerusi Akta Mahkamah Kehakiman (Pindaan) 2022 [dikenali

A sebagai Akta A1661], yang menidakkan hak untuk merayu, adalah bercanggah ('*Ultra vires*') Perkara 5(1), dan/atau Perkara 10(1)(a) dan 10(2)(a) Perlembagaan Persekutuan;

2) Suatu Deklarasi bahawa pindaan kepada Seksyen 68(1) Akta Mahkamah Kehakiman 1964 [Akta 91] dengan memasukkan
B Perenggan (e), (f), dan (g) menerusi Akta Mahkamah Kehakiman (Pindaan) 2022 [dikenali sebagai Akta A1661], yang menidakkan hak untuk merayu, adalah bercanggah ('*Ultra vires*') Perkara 5(1), dan/atau Perkara 10(1)(a) dan 10(2)(a) Perlembagaan Persekutuan;

3) Suatu Perintah bahawa pindaan kepada Seksyen 28 (1) Akta Mahkamah Kehakiman 1964 [Akta 91] dengan meminda
C Sub-seksyen (1) dan memasukkan Perenggan (b), (c), dan (d) menerusi Akta Mahkamah Kehakiman (Pindaan) 2022 [dikenali sebagai Akta A1661] dan Seksyen 68(1) Akta Mahkamah Kehakiman 1964 [Akta 91] dengan memasukkan Perenggan (e), (f), dan (g) menerusi Akta Mahkamah Kehakiman (Pindaan) 2022
D [dikenali sebagai Akta A1661] dimansuhkan di bawah Peruntukkan Perkara 162(6), dan 162(7) Perlembagaan Persekutuan;

4) Jika Mahkamah menjawab persoalan undang-undang di dalam perenggan (1), (2) dan (3) di atas secara afirmatif, suatu perintah bahawa Plaintif-Plaintif yang dinamakan di atas dibenarkan untuk
E merayu kepada Mahkamah Rayuan di Putrajaya di atas keputusan Pesuruhjaya Kehakiman bertarikh 18.10.2022 yang telah menolak permohonan Plaintif-Plaintif untuk membatalkan Writ Saman dan Pernyataan Tuntutan di bawah Aturan 18 Kaedah 19(1)(a) dan (b) Kaedah-Kaedah Mahkamah 2012 dalam tempoh tiga puluh (30) hari daripada tarikh perintah ini;

F 5) Perintah-perintah selanjutnya yang berkaitan dan perlu yang difikirkan adil dan suai manfaat oleh Mahkamah yang Mulia;

6) Kos tindakan ini.

[3] Before I go on to elaborate on this court's decision in dismissing
G encl. 1 and as a starting point, it is best to go one step back and to highlight that earlier, the plaintiffs had filed a notice of application in encl. 14 under the provision of s. 84 of the Courts of Judicature Act 1964 (Act 91) ("the CJA") to have eight questions referred to the Federal Court (FC), which substantially mirrored the reliefs sought in encl. 1 as could be seen from the same prayers sought by the plaintiffs wherein:

H a) Bahawa soalan (1), (2) dan (3) dalam Saman Pemula bertarikh 30.11.2022 (Lampiran 1) dinyatakan dalam bentuk kes khas di bawah Seksyen 84(4) Akta Mahkamah Kehakiman 1964 untuk memutuskan isu-isu khas di bawah Perlembagaan Persekutuan dan undang-undang seperti berikut:

I (i) …

(ii) …

b) Bahawa segala prosiding di hadapan Mahkamah Yang Mulia ini digantung sementara menunggu penyelesaian kes khas ini di Mahkamah Persekutuan; dan

c) Apa-apa relif lain yang Mahkamah ini fikirkan adil dan suaimanfaat untuk diberikan.

[4] The eight questions ("proposed questions") posed in encl. 14 have been translated as follows:

(i) Whether the amendment to Section 28(1) of the CJA by amending subsection (1) and inserting paragraphs (b), (c) and (d) through the Act A1661 is unconstitutional, void, invalid, contradicts and/or violates the principle of fundamental liberty or freedom of expression guaranteed under Article 10(1)(a), and in consequence of which violates the fundamental liberties of the public at large guaranteed under Article 5(1) of the FC;

(ii) Whether the amendment to Section 68(1) of the CJA by inserting Paragraphs (e), (f) and (g) in the Act A1661 is unconstitutional, void, invalid, contradicts and/or violates the principle of fundamental liberties or freedom of expression guaranteed under Article 10(1)(a) and in consequence of which violates the fundamental liberties of the Public at large guaranteed under Article 5(1) of the FC;

(iii) Whether the Parliament had exceeded the powers and limits set under Article 10(2)(a) of the FC in unconstitutionally amending Section 28(1) and Section 68(1) of the CJA, by violating the freedom of expression of the people, that is guaranteed under Article 10(1)(a) of the FC, and in consequence of which violates the basic structure of the FC, under Article 4(1) of the FC;

(iv) Whether Section 28(1) of the CJA by amending Sub-section (1) and inserting Paragraphs (b), (c) and (d) in the Act A1661 and Section 68(1) the CJA by inserting Paragraphs (e), (f) and (g) in the Act A1661 violates the right of the people, that is guaranteed under Article 8(1) of the FC;

(v) Whether the Federal Court's decision in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [20201 3 CLJ 153 (majority 4 Learned Judges) that contradicts the earlier Federal Court's decision in the case of *Kempadang Bersatu Sdn Bhd v. Perkayuan OKKS No. 2 Sdn Bhd* [2019] 4 MLJ 614 (majority decided by 5 Learned Judges), has override the previous decision in *Kempadang* as has been decided in the case *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1;

(vi) Whether a Federal Court in deciding a new general principle of law to override its own previous decision shall overrule the previous decision, to avoid the confusions;

A (vii) Whether the principle decided in the case of *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1 is a good law, or the Federal Court shall expressly overrule the previous decision to avoid the confusions; and

(viii) If the Questions in the paragraphs (i), (ii), (iii), and (iv) is answered B affirmatively, whether a judgment or an order, of the Civil Court through an interlocutory applications, other than the issue pertaining to the admissibility of documents, during the trial proceedings or at any stage of the case, shall be classified as a 'decision' or 'ruling' based on the purposive interpretation, of Section 3 of the Court of Judicature Act 1964.

C **[5]** In essence, having filed the originating summons to pray for the HC's determination on the sole issue of the constitutionality of ss. 2 and 8 of the Courts of Judicature (Amendment) Act 2022 (Act A1661) ("Act 1661"), the plaintiffs in encl. 14 had attempted to prevent the HC from making any determination of the originating summons but instead, to transfer the entire D case to be disposed of by the FC instead. The role of the HC would then be reduced to a mere messenger. That cannot be the purpose and intent of s. 84 of the CJA, or of the jurisdiction of the courts under the FC. The validity of the Act 1661 was challenged on the ground that it was unconstitutional for violating the basic structure of the Constitution under arts. 4, 8 and 121 E of the Federal Constitution. It was the plaintiffs' contention that the amendments had denied them their right to appeal the decision of the HC dated 18 October 2022 ("the impugned decision") and therefore, *ultra vires* arts. 5(1) and 10(1)(a) and (2)(a) of the Federal Constitution. The impugned decision was in respect of an O. 18 r. 19 of the Rules of Court 2012 (ROC) F application by the plaintiffs who were defendants nos. 3, 4 and 5 in the Civil Suit No. AB-22NCVC-8-03-2021 in *Pasir Bogak Indah Sdn Bhd & Ors v. Ong Chin Wei & Or*s [2022] CLJU 2643; [2022] 1 LNS 2643 ("the suit"). The main ground for the application was because the plaintiffs in the present application were not privy to the disputed contracts entered into by the plaintiff and defendants nos. 1, 2 and 6 in the suit. This court had dismissed G the striking out application because there were triable issues on the claim of conspiracy to defraud by the eight defendants in the suit against the plaintiff which should be ventilated in a full trial.

[6] After hearing submissions of the parties on encl. 14, the court reserved H its decision to 11 December 2023. In its decision, based on the affidavits and submissions and case laws cited, this court agreed with the defendants' submissions and held that by seeking to refer the proposed questions to the FC for determination, the plaintiffs were attempting to transfer the case to the FC for determination of the originating summons in its entirety without the apex body having the benefit of the HC's views on these questions. This I court viewed that the constitutional issues could be raised before the HC and

ought to be decided by this court as being the first court in the judicial hierarchy to be entrusted with judicial power and has the original jurisdiction on such matters.

[7] The exclusive original jurisdiction of the FC is very restricted because under art. 128(1), the only types of cases that can be determined directly and wholly by the FC are:

(i) questions whether a law is invalid on the ground that Parliament or the State Legislature has no power to make laws with respect to that matter; and

(ii) disputes between States or between the Federation and any State.

All other cases, including constitutional issues, they do not fall within the original jurisdiction of the FC. The FC is not a constitutional court, but the court of final appeal. It is trite law that all courts have the jurisdiction and power to interpret the Federal Constitution and determine constitutional issues.

[8] The plaintiffs in their argument on encl. 14 had referred to the decision of the learned Judicial Commissioner, Azizan bin Md Arshad (JC) in *Zulkifli Ibrahim v. Dewan Undangan Negeri Pulau Pinang & Anor* [2022] CLJU 1683; [2022] 1 LNS 1683; [2022] MLJU 1731 which allowed the matter to be transmitted to the Federal Court for determination. Nevertheless, in that case in referring the case to the FC under s. 84 of the CJA, the learned JC had also considered art. 128 of the FC. *Zulkifli Ibrahim*'s case (*supra*) concerned the issue of the validity of a law that was being challenged on the ground that the State Legislative Assembly had legislated on a matter beyond its power to make laws. Under art. 128(1)(a) of the Federal Constitution, the FC shall have jurisdiction to determine any question on whether a law made by the Parliament or Legislature of a State is invalid on the ground that it makes provision on a matter with respect to which the Parliament or Legislature of the State has no power to make laws. *Zulkifli Ibrahim*'s case (*supra*) was a competency challenge and could be distinguished with the present case since there was no such issue which fell under art. 128 of the FC as in the present case. This court agreed that the present case was purely based on consistency challenge and therefore, *Zulkifli Ibrahim*'s case was irrelevant for the purpose of this court.

[9] In considering whether to grant the declarations and other reliefs sought by the plaintiffs, I noted the distinction between an "incompetency challenge" and an "inconsistency challenge". This issue had been addressed by the FC in *Wong Shee Kai v. Government Of Malaysia* [2022] 10 CLJ 1; [2022] 6 MLJ 102. There, Tengku Maimun binti Tuan Mat Chief Justice, had made it clear in that case as follows:

(4) Where constitutional issues could be raised before the High Court, they ought to be so raised there as being the first court in the judicial hierarchy to be entrusted with judicial power. Ignoring that and allowing cases to come directly to the Federal Court was to ignore our very own constitutional design (see para 18).

(5) Any challenge that required leave under art. 4(4) of the FC was called an 'incompetency challenge' while all other challenges that could be brought before the High Court were called 'inconsistency challenges' even though the result of both might be that under art. 4(1) the impugned provision of law was inconsistent with the Federal Constitution (see para 26).

(6) An 'incompetency challenge' involved a very specific allegation under art. 4(3) that Parliament or the State Legislature had no power to make a law. And they required leave under art 4(4) before they could be initiated and the relief sought in the petition must be limited to a declaration that the relevant provision was invalid on the ground that the Federal or the State Legislature had no power to make it. These were the challenges that fell under the original jurisdiction of the Federal Court under art 128(1). *Any other 'inconsistency' challenge which alleged that a particular provision of law was invalid because it was inconsistent with the Federal Constitution – usually Part II – was not caught by art 4(3) and had to be brought in the first instance in the High Court (see paras 25 & 27-28).* …

(emphasis added)

[10] In the case of *Mark Koding v. PP* [1982] CLJU 15; [1982] 1 LNS 15; [1982] 2 MLJ 120, the Supreme Court held:

Secondly, we would observe that it would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez v. Attorney-General* [1970] 1 MLJ 262, 264) and decided the case one way or the other. If he had done that and therewere an appeal to us, the whole matter would have been disposed of in two steps.

By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter wouldcome back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of section 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination ofthese proceedings.

[11] The defendants referred to the case of *Teek v. President* [2015] LRC 508 where the Supreme Court of Namibia held:

It is undesirable for this court to sit as a court of first and last instance on important constitutional questions without the benefit of the High Court's views on these questions. The importance of such views cannot be gainsaid. It enables the parties to refine and develop further arguments in the light of the reasoning of the High Court. Through this process, the issues will become more crystallised. By the time the matter reaches this court, all possible arguments would have been raised and debated, and this will place this court in a better position, as a court of final instance, to resolve the matter in the light of these arguments.

[12] In dismissing encl. 14, this court found that the plaintiffs had not satisfied the requirements of s. 84 of the CJA because:

(i) there were issues of fact to be determined by the HC, which were separate and distinct from the constitutional questions referred; and

(ii) the reference to the FC would have the effect of wholly disposing of the entire case before the HC.

[13] The merits of the question must be ventilated at the first instance. It is not in the interests of justice for the FC to sit as a court of first and final instance on constitutional issues, without the benefit of the HC's views and without giving litigants any right to appeal, which ironically was the plaintiffs' complaint in the present originating summons application.

Cause Papers

[14] The relevant cause papers in this application were as follows:

(i) originating summons dated 30 December 2022 (encl. 1);

(ii) plaintiffs' affidavit in support affirmed by Chew Khor Teng on 29 November 2022 (encl. 2);

(iii) defendants' affidavit in reply affirmed by Dato' Hasbi binti Hassan on 13 February 2023 (former Chief Registrar of the Federal Court) (encl. 3);

(iv) plaintiffs' affidavit in reply affirmed by Chew Khor Teng on 28 February 2023 (encl. 4); and

(v) defendants' affidavit in reply affirmed by Dato' Hasbi binti Hassan on 23 March 2023 (encl. 5).

[15] As stated above, the basis of encl. 1 was due to the fact that this court had dismissed the plaintiffs' O. 18 r. 19 of the ROC application to extricate themselves from the civil suit filed by the plaintiff in March 2021. Hence, the background of the civil suit would be pertinent because in that suit were "the issues of fact" which the plaintiffs failed to satisfy in encl. 14.

[16] The main suit arose out of the alleged breach of payment promised by defendant 6 to the plaintiff (in the civil suit) under a memorandum of agreement dated 4 February 2020 ("the MOA") and for the guarantee given by the defendant 1 to the plaintiff under the letter of guarantee dated the same ("the LOG"). Subsequently, the MOA and LOG were amended by the Supplementary Agreement dated 20 February 2020 ("the 20 February 2020 SA") and by the Supplementary Agreement dated 10 June 2020 ("the 10 June 2020 SA").

[17] There have been numerous notice of applications filed in the civil suit, *inter alia*, for striking out, summary judgment, judgment in default, consolidation, amendment of defence, and further and better particulars. Most of these applications had been disposed of. The trial has been set in 2025. The defendants 1, 2 and 6 had applied in encl. 5 on 7 April 2021, *inter alia*, to strike out the plaintiff's writ and statement of claim and they relied on all four grounds under that order in support of the application. Meanwhile, the plaintiff on 3 May 2021 filed in encl. 22 an application for summary judgment under O. 14 of the ROC against defendants 1 and 6 to recover the whole or part of the amount of RM9,615,000 ("the said amount"), purportedly owed to the plaintiff. The said amount, which included interest, was in respect of the purchase price of a piece of land registered under Geran 55417, Lot 41, Pekan Pasir Bogak, Daerah Manjung, Negeri Perak ("the said property") owned by the plaintiff that was sold to the defendant 6 under a sale and purchase agreement ("the SPA") dated 4 February 2020. The said property is the same property mentioned by the present plaintiffs in encl. 1.

[18] Enclosure 5 and encl. 22 were heard together on 22 February 2022. The decisions for both applications were delivered on 30 March 2022 where the court dismissed both applications with no order as to costs. Both parties appealed against the decisions but the matters have been struck off due to the amendments to s. 68 of the CJA. The plaintiffs had their application in encl. 26 under O. 18 r. 19 heard on 7 September 2022. The impugned decision was delivered on 18 October 2022. Act 1661 came into force on 1 October 2022.

[19] The brief facts were stated in encl. 1 as the basis for the application (and elaborated in encl. 2) as follows:

> i. Plaintif Pertama dan Plaintif Kedua yang merupakan (Defendan Ketiga dan Defendan Keempat) telah disaman di atas kapasiti selaku Pengarah kepada HLL Management Sdn Bhd (Defendan Ketujuh) dan Plaintif Kedua dan Plaintif Ketiga (Defendan Keempat dan Defendan Kelima) telah disaman di atas kapasiti selaku Pengarah kepada Pangkor Venice World Sdn Bhd (Defendan Kelapan) oleh Pasir Bogak Indah Sdn Bhd (Plaintif) di dalam Guaman Sivil No. AB-22NCVC-8-03/2021 di Mahkamah Tinggi Taiping;
>
> ii. Pasir Bogak Indah Sdn Bhd (Plaintif) di dalam Guaman Sivil No. AB22NCVC-8-03-2021 memfailkan tuntutan terhadap Plaintif-Plaintif untuk menuntut baki jumlah balasan di bawah Perjanjian Jual Beli dan Memorandum Perjanjian bertarikh 4.2.2020 yang telah dimasuki di antara Pasir Bogak Indah Sdn Bhd (Plaintif) dan Supreme Infinity Land Sdn Bhd (Defendan Ke-6) di dalam Guaman Sivil No. AB-22NCVC-8-03-2021 yang mana Plaintif-Plaintif tidak privi kepada Perjanjian Jual Beli tersebut;

iii. Plaintif Kedua dan Plaintif Ketiga adalah Pengarah-pengarah syarikat HLL Management Sdn Bhd yang telah dilantik sebagai syarikat Pengurusan Resort oleh Supreme Infinity Land Sdn Bhd selaku pemilik berdaftar hartanah yang dikenali sebagai Geran 55417, Lot 41, Pekan Pasir Bogak, Daerah Manjung, Negeri Perak ('selepas ini dirujuk sebagai hartanah tersebut') melalui Perjanjian Pengurusan bertarikh 1.3.2020, yang tidak kena mengena dengan Perjanjian Jual Beli 4.2.2020;

iv. Plaintif Pertama dan Plaintif Kedua adalah Pengarah-pengarah syarikat Pangkor Venice World Sdn Bhd yang telah dilantik sebagai syarikat Pemaju oleh Supreme Infinity Land Sdn Bhd selaku pemilik berdaftar hartanah tersebut melalui Perjanjian Usahasama bertarikh 21.11.2020, yang tidak tidak kena mengena dengan Perjanjian Jual Beli 4.2.2020;

v. Plaintif-Plaintif selanjutnya telah memfailkan permohonan untuk membatalkan Writ Saman dan Pernyataan Tuntutan di bawah Aturan 18, Kaedah 19(1)(a) dan (b) Kaedah-Kaedah 2012 pada 3.5.2021 di Guaman Sivil No. AB-22NCVC-8-03/2021 tetapi telah ditolak oleh Mahkamah Tinggi Taiping pada 18.10.2022;

vi. Plaintif-Plaintif ingin merayu kepada Mahkamah Rayuan Putrajaya terhadap keputusan Mahkamah Tinggi tetapi memandangkan pindaan Seksyen 68(1) Akta Mahkamah Kehakiman (Pindaan) 2022 telah berkuatkuasa pada 1.10.2022 yang tidak membenarkan permohonan untuk membatalkan Writ saman dan Pernyataan Tuntutan yang telah ditolak oleh Mahkamah Tinggi untuk dirayu ke Mahkamah Rayuan;

vii. Plaintif-Plaintif juga mendapati seksyen 28(1) Akta Mahkamah Kehakiman juga telah dipinda dengan meminda Sub-seksyen (1) dan memasukkan Perenggan (b), (c), dan (d) menerusi Akta Mahkamah Kehakiman (Pindaan) 2022 [dikenali sebagai Akta A1661], yang berkuatkuasa pada 1.10.2022, juga menidakkan hak untuk merayu daripada Mahkamah Rendah ke Mahkamah Tinggi;

viii. Plaintif-Plaintif mencabar pindaan-pindaan yang menidakkan hak untuk merayu kepada pihak awam, yang amat bercanggah ('*Ultra vires*') dengan hak-hak yang diperuntukkan di bawah Perlembagaan Persekutuan, terutamanya Perkara 4 (1), Perkara 5(1), dan/atau Perkara 10(1)(a) dan 10(2)(a) Perlembagaan Persekutuan, di mana pindaan yang dilakukan adalah bertentangan dengan kepentingan awam, dan tindakan ini harus didengar dan diputuskan untuk manfaat orang awam, supaya hak orang awam tidak dicabuli dengan suatu pindaan, yang tidak berperlembagaan. Plaintif-Plaintif mempunyai hak untuk merayu ke Mahkamah Rayuan terhadap apa-apa keputusan Mahkamah Tinggi sebelum 1.10.2022, namun hak Plaintif-Plaintif kini telah dicabuli dengan pindaan undang-undang yang tidak berperlembagaan, dan Plaintif-Plaintif harus diberikan hak untuk merayu ke Mahkamah Rayuan.

A

ix. Mahkamah mempunyai kuasa di bawah Perkara 162(6) dan 162(7) Perlembagaan Persekutuan untuk memansuhkan sesuatu undang-undang ataupun pindaan undang-undang yang tidak berperlembagaan.

[20] Meanwhile, the basis for the claim against the plaintiffs can be found in the statement of claim (encl. 2 of the civil suit) which I have reproduced B here for ease of reference:

[2.6] *Defendan Ketiga adalah pengarah kepada Defendan Kelapan* sejak 20.11.2020 dan memegang 50% daripada syer-syer yang dikeluarkan oleh Defendan Kelapan *ie*, 1 syer pada 07.02.2021. *Defendan Keempat adalah pengarah kepada Defendan Kelapan* sejak 20.11.2020 dan memegang 50% C daripada syer-syer yang dikeluarkan oleh Defendan Kelapan *ie*, 1 syer pada 07.02.2021.

[2.7] *Defendan Keempat adalah pengarah kepada Defendan Ketujuh* sejak 24.01.2020 dan memegang 50% daripada syer-syer yang dikeluarkan oleh Defendan Ketujuh *ie*, 200,000 syer-syer pada 07.02.2021. *Defendan Kelima adalah pengarah kepada Defendan Ketujuh* sejak 24.01.2020 dan memegang D 50% daripada syer-syer yang dikeluarkan oleh Defendan Ketujuh *ie*, 200,000 syer-syer pada 07.02.2021.

[2.8] Defendan Keenam merupakan pemilik berdaftar untuk hakmilik yang dipegang di bawah Geran 55417, Lot 41, Pekan Pasir Bogak, Daerah Manjung, Negeri Perak (selepas ini dipanggil "Hartanah Tersebut"). E Hartanah Tersebut mempunyai alamat pos di No. 41, Jalan Pasir Bogak, 32300 Pulau Pangkor, Perak, Malaysia iaitu alamat berdaftar dan alamat perniagaan Defendan Ketujuh.

[2.9] *Defendan Keenam dan Defendan Ketujuh* kononnya telah memasuki suatu perjanjian pengurusan untuk pengurusan Hartanah Tersebut di F mana *Defendan Ketujuh kononnya telah membayar kepada Defendan Keenam deposit dalam amaun yang tidak diketahui oleh Plaintif dan Defendan Keenam bersetuju untuk membenarkan Defendan Ketujuh memasuki suatu kaveat persendirian secara dan melalui Borang 19B bertarikh 21.01.2021 terhadap Hartanah Tersebut pada 21.01.2021* (selepas ini dipanggil "Kaveat Konon Defendan Ketujuh").

G

[2.10] *Defendan Keenam dan Defendan Kelapan* kononnya telah memasuki suatu perjanjian usaha sama untuk pemajuan bersama Hartanah Tersebut di mana *Defendan Kelapan kononnya telah membayar kepada Defendan Keenam deposit dalam amaun yang tidak diketahui oleh Plaintif dan Defendan Keenam bersetuju untuk membenarkan Defendan Kelapan memasuki suatu kaveat* H *persendirian secara dan melalui Borang 19B bertarikh 15.01.2021 terhadap Hartanah Tersebut pada 21.01.2021* (selepas ini dipanggil "Kaveat Konon Defendan Kelapan").

…

[9] Defendan Pertama, Defendan Kedua, Defendan Ketiga, Defendan Keempat, I *Defendan Kelima, Defendan Keenam, Defendan Ketujuh dan/atau Defendan Kelapan dan/atau gabungan sebahagian daripada Defendan-Defendan (selepas ini*

dipanggil "Konspirator-Konspirator Tersebut") secara bersesama dan/atau berasingan bekerjasama, berkomplot, bertindak bersama-sama dan/atau bergabung sesama mereka sendiri dengan niat dan dengan tujuan utama untuk mencederakan Plaintif secara kewangan melalui tindakan yang menyalahi undang-undang untuk memperolehi Hartanah Tersebut tanpa apa-apa bayaran untuk Hartanah Tersebut.

[10] Butir-butir konspirasi tersebut yang sekarangnya diketahui oleh Plaintif adalah *inter alia* seperti yang berikut: …

(emphasis added)

[21] Paragraph 10 sets out the details in the alleged conspiracy to defraud and "mindboggling" would be an understatement if the court was to describe in one word, the allegations of the conspiracy allegedly perpetrated on the plaintiff in the civil suit. The gist of it was that the said conspirators, including the plaintiffs in the present case, knew that the directors and the controlling shareholders of the plaintiff (in the civil suit) were desperate to sell said property to pay off moneylenders and had no choice but to enter into said term sheet and said contracts on the terms and conditions dictated by said conspirators and on terms and conditions favourable to said conspirators. The said conspirators allegedly never had any intention of paying the purchase price of RM14,500,000 specified in the 4 February 2020 SPA or any part thereof. Whereas, the bank (Malayan Banking Berhad) had already disbursed the full loan of RM7,800,000 taken by defendant 6. To date, the plaintiff had only received RM5,500,000 and then the property was transferred to defendant 6. In December 2020, defendant 6 had filed a civil suit against the plaintiff for fraudulent misrepresentation such that it had purchased the property without knowing that the property was not free from encumbrances. Hence, the application for consolidation of both suits (encl. 25).

[22] Needless to say, the pleadings were complex and this court found that there were triable issues in the civil suit to be decided by the court, *inter alia*, that:

(i) there were clear disputes of facts as to whether the plaintiff indeed had a cause of action against the defendants, namely, on the alleged failure to pay the balance of the purchase price;

(ii) whether the plaintiff misrepresented to defendant 6 on the status of the said property;

(iii) the provisions of the clauses in the respective agreements need to be examined and deliberated upon in order for the court to determine whether the plaintiff had indeed failed to deliver vacant possession;

(iv) if the plaintiff's action had indeed caused the defendants to renege on the agreements, whose obligation was it to remove the encroachment(s);

(v) the basis for the private caveats entered by defendants 7 and 8 upon the said property (wherein defendants 3, 4 and 5 were related to/controlled the defendants 7 and 8);

(vi) lifting of the corporate veil (pertaining to all the defendants); and

(vii) whether the defendants had been involved in a conspiracy to deny the plaintiff of the disputed amount and to obtain the said property at a price much lower than its value despite agreeing to pay the purchase price of RM14,500,000.

[23] Upon perusal of the pleadings of the parties, the court viewed that these issues needed to be ventilated in a full trial where witnesses will have to be called and it cannot be resolved by affidavit evidence only. Additionally, where fraud is alleged, it is not a suitable case to strike out a pleading. It is trite law that claims for fraud and negligence cannot be disposed of in a summary manner without taking *viva voce* evidence: *OCBC Bank (Malaysia) Bhd v. Yong Hong Development Sdn Bhd & Ors* [2021] CLJU 1176; [2021] 1 LNS 1176; [2021] MLJU 1301. It is noted that there was no notice of appeal filed by the plaintiffs against this court's decision in respect of encl. 26.

Evaluation And Findings Of The Court

The Inconsistency Challenge

[24] The plaintiffs submitted that the amendments to the CJA were *ultra vires* the Federal Constitution wherein Parliament had exceeded it powers under arts. 10 to 10(2(a). It was contended that the amendments were for the convenience of the courts but had curtailed the freedom of expression guaranteed under art.10(2)(a). The counsel for the plaintiffs stated that Parliament had no right to make the amendments for the convenience of the courts. Pursuant to the amendments, the litigants have no right to appeal and further, they were discriminatory in nature.

[25] The plaintiffs argued that the litigants' personal liberty and freedom of expression had been clearly restricted by the amendments to ss. 28(1) and 68(1) of the CJA what contradicted arts. 5 and 10 of the Federal Constitution. Any law enacted cannot deny the right of the public to access to justice, including the right to appeal (freedom of expression) against a court's decision that the public is dissatisfied with, as otherwise, curtailing such right would be unconstitutional. It was submitted on behalf of the plaintiffs further that all final decision made upon hearing an application shall be considered a "decision" and not merely a "ruling" in the course of a trial. The difficulty with the impugned decision which could not be appealed against had made it mandatory for the plaintiffs to defend themselves in a protracted trial and they would have to spend a considerable amount of money in legal costs and fees in that process.

[26] This court was urged to annul any amendment made without proper consideration of the rights provided by the Federal Constitution and to provide justice to the public especially the plaintiffs in this case. It was alleged that the defendants (in the affidavits of the former Chief Registrar of

the Federal Court) had only raised the issue of procedural compliance during the Parliament process when the amendments were made, but failed to justify on the constitutionality or otherwise of the amendments to the CJA. It was submitted that the amendments could not be justified because of the provisions of art. 10(2)(a) which have clearly spelt out the limits that can legally be imposed upon the people. Article 10 provides:

> Freedom of speech, assembly and association
>
> 10. (1) Subject to Clauses (2), (3) and (4) -
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form associations.
>
> (2) Parliament may by law impose -
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;
>
> (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;
>
> (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

[27] The provision of art. 8(1) was also cited that "All persons are equal before the law and entitled to the equal protection of the law" and the case of *Datuk Hj Harun Hj Idris & Ors v. PP* [1977] CLJU 24; [1977] 1 LNS 24; [1977] 2 MLJ 155 in support of their argument that the amendments were discriminatory and unsconstitutional. Nevertheless, this court noted that in that case, the Federal Court stated:

> Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:
>
> 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
>
> …
>
> With respect we would agree with the Solcitor-General's submission that the first question we should ask is, is the law discriminatory, and that the that the answer should then be – *if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law,*

A *but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.*

…

B 8. *Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and*

C *reasons of the bill, the preamble and surrounding circumstances, as well as from the provisionsof the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law.* (Minority judgment in *NI Caterers* AIR 1967 SC 1581 and judgment in *M Chhagganlal* AIR 1974 SC 2009. We think that we should follow the same principle.

D 9. *In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.* (Per Sastri CJ in *Anwar Ali* AIR 1952 SC 75). (emphasis added)

E **[28]** It was submitted in para. 23 of the plaintiffs' submissions that, the amendments were discriminatory because they curtailed the rights of the aggrieved member of the public to appeal to the HC and/or CoA if the lower courts dismissed the summary judgment application or striking out application, but there was no provision to curtail the right of appeal of the

F other litigant in the same suit should the application be allowed. Therefore, impliedly, in the event that the applications were allowed, the defendants in that case can still submit an appeal to the higher courts. The plaintiffs asked, why is there two different types of rights for two litigants, depending on whether particular applications are allowed or dismissed?

G **[29]** This court viewed that the plaintiffs have obviously failed to understand and appreciate the purpose of the amendments. The CoA in the case of *Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar* [2024] 4 CLJ 353, stated:

H [23] On a side note, as an aid of statutory interpretation, we believe our view is in line with the object and intent of the amendment to the CJA 1964, as evident by the speech of the then Deputy Minister at the Prime Minister's Office when the bill was tabled for second and third reading on 25 July 2022 in Parliament:

I ... Cadangan pindaan kepada Akta Mahkamah Kehakiman 1964 [Akta 91] melibatkan dua perkara utama iaitu mengehadkan rayuan untuk kes-kes interlokutori sivil dan penyediaan dokumen dan rekod rayuan bebas kertas dalam prosiding perbicaraan rayuan jenayah ...

... Kaedah perubahan substantif yang dicadangkan ialah dengan mengehadkan rayuan dari Mahkamah Rendah ke Mahkamah Tinggi dan dari Mahkamah Tinggi ke Mahkamah Rayuan dengan mengehadkan rayuan dalam kes-kes permohonan interlokutori yang tidak memprejudiskan hak pihak-pihak ...

... Keduanya, berkenaan pindaan seksyen 28. Fasal 2 rang undang-undang bertujuan untuk meminda seksyen 28, Akta 91 untuk mengehadkan hak untuk merayu dari mahkamah rendah ke Mahkamah Tinggi dalam kes sivil, dalam hal keadaan jika mahkamah rendah itu menolak mana-mana permohonan untuk penghakiman terus atau mana-mana permohonan untuk membatalkan mana-mana writ ataupun pliding atau membenarkan mana-mana permohonan peruntukan mengetepikan penghakiman ingkar ...

... Pindaan seksyen 68. Fasal 8 bertujuan untuk meminda seksyen 68. Akta 91 bagi mengehadkan hak untuk merayu dari Mahkamah Tinggi ke Mahkamah Rayuan dalam kes sivil, dalam hal keadaan Mahkamah Tinggi itu menolak mana-mana permohonan untuk penghakiman terus mana-mana permohonan untuk membatalkan mana-mana writ ataupun pliding dan membenarkan manamana permohonan untuk mengetepikan penghakiman ingkar. (emphasis added)

[30] The affidavit in reply by the former Chief Registrar of the Federal Court did not "only raise the issue of procedural compliance during the Parliament process when the amendments were made" as alleged, because referring to encl. 3, it was stated therein as follows:

5. Saya menyatakan bahawa cadangan untuk mengehadkan rayuan bagi kes-kes interlokutori sivil yang melibatkan pindaan kepada subseksyen 28(1) dan 68(1) Akta Mahkamah Kehakiman 1964 [Akta 91] adalah perkara/keputusan dasar yang telah dibuat melalui *Mesyuarat Jawatankuasa (Mesyuarat JK) Kaedah-Kaedah pada 22.3.2019 dan 9.9.2020 yang dianggotai oleh wakil Badan Kehakiman dan wakil Majlis Peguam, Persatuan Undang-Undang Sabah, Persatuan Peguambela Sarawak dan Jabatan Peguam Negara.*

…

11. … Sebaliknya saya menegaskan seperti yang berikut:

11.1 pindaan kepada subseksyen 28(1) dan 68(1) Akta Mahkamah Kehakiman 1964 melalui Akta Mahkamah Kehakiman (Pindaan) 2022 [Akta 1661] yang mula berkuat kuasa pada 1 Oktober 2022-

(i) *telah melalui rundingan awam dengan pemegang taruh dan pihak berkepentingan;*

(ii) telah dibentangkan di Dewan Rakyat dan Dewan Negara serta mendapat perkenan Yang diPertuan Agong pada 31 Ogos 2022;

A

11.2 *Plaintif-Plaintif dan orang awam secara umumnya tidak dinafikan hak untuk merayu memandangkan pindaan tidak melupuskan hak pihak-pihak secara muktamad (does not dispose of the rights of the parties) kerana pihak-pihak masih mempunyai ruang untuk menghujahkan kes dalam perbicaraan penuh (full trial) dan Mahkamah akan memberikan penghakiman berdasarkan merit sesuatu kes. Dengan ini asas atau "fundamentals" iaitu akses kepada keadilan masih kekal;*

B

11.3 saya mengulangi penyataan di perenggan 5 di atas; dan

11.4 pindaan kepada Akta 91 tersebut adalah sah dan tidak bertentangan dengan Perkara 4(1), Perkara 5(1) dan Perkara 10(1) dan (2) (a) Perlembagaan Persekutuan … (emphasis added)

C

[31] Clearly, the defendants had given the justification for the amendments to the CJA and the constitutionality thereof. In my view, the affidavit in reply did not need to be very lengthy when the issues to be responded to had been sufficiently explained in the encl. 3 where stakeholders' inputs including the Bar Council's had been obtained, might I add also of which the plaintiffs' solicitors are bound by its rulings and decisions. The justification was further reinforced in encl. 5. The reply in encl. 5 in para. 6 clarified that the Rules Committee formed under s. 17 of the CJA only stated their policy decision in regard to the proposed amendments. This was later brought up to the relevant Minister in the Prime Minister's Department for consideration and then on to the Cabinet which approved for the amendments to be debated/legislated in Parliament. The amendment bill was debated and approved by Parliament and not the Rules Committee or the judiciary *per se*.

D

E

F

[32] The reply was necessary because the plaintiffs in encl. 4, alleged that the response from the Chief Registrar of the Federal Court proved that the Judiciary was directly involved in the amendments process and therefore, this has resulted in biasness (actual and apprehended) in this application whereby it appeared as if the whole of the judiciary supported the amendments for judicial time would have been saved, at the expense of the litigants. Hence, there is no separation of powers between the Executive and the Judiciary. The plaintiffs averred that the application should be heard by an independent body of jurists and judges whom had not attended any of the discussions leading to the finalisation of the amendment bill. Moreover, the averments by the defendants had not been supported by any documents to show the engagements with the stakeholders. The plaintiffs believed that they had merits in the appeal and would be able to argue that the civil suit could be easily struck out if the appeal was allowed to be heard at the CoA level. The plaintiffs also stated in encl. 4 that they would be filing an application under s. 84 of the CJA for the matter to be referred to the FC for determination as it involved a constitutional question. At this point, I have already stated this court's views and decision in respect of the encl. 14 aplication earlier in this grounds of judgment.

G

H

I

[33] But I would just add here that to answer the plaintiffs, question on the capacity of the former Chief Registrar of the Federal Court who deposed the defendants' affidavit, a person holding that position would be the best person to give evidence for the defendants on this issue as stated in paras. 1 and 2 of encls. 3 and 5. However, the plaintiffs in para. 4 of encl. 4 had attacked the credibility of the top most Government officer in the office of the Chief Registrar of the Federal Court without any evidence to back up their claims of biasness.

[34] I refer to the recent CoA decision in the case of *Azinal Sdn Bhd v. Jannath Gani & Ors And Other Appeals* [2024] 4 CLJ 335; [2024] 4 AMR 121 where that appeal was also in respect of a striking out application by the HC in its original jurisdiction to dismiss the appellant's application to strike out the the respondents' claim. The respondents raised a preliminary objection against appeal No. 360 (*Azinal*'s case) on the premise that the appeal was incompetent and should be struck out *in limine*, in view of s. 68(1)(f) of the CJA which deemed the HC's decision (in dismissing a striking out application) to be a non-appealable decision of the HC. The appellant rebutted by stating that by virtue of s. 67 of the CJA, it had the vested right of appeal which would remain intact until the Courts of Judicature (Amendment) Act 2022 ("the Amendment Act") took effect; and considering the prospective operation of the Amendment Act, the amendment should not retrospectively disturb the appellant's substantive right to appeal which was vested in the appellant since the commencement of the suit. The CoA held, striking out the appeal:

1(a) Even though the right of appeal conferred *via* s. 67 of the CJA is a statutory right established by legislation and is a substantive right and not merely a procedural right as contended by the appellant, it shall be subject to the restrictions or qualifications stipulated under s. 68 of the CJA. *The appellant's interpretation that prospective effect should be given to the amendment to the CJA would grossly undermine, defeat, and flout the very purpose and objectives that the amendment was seeking to achieve ie, to curtail the abuse of interlocutory appeals as a tactic to unnecessarily protract litigation, exhaust counterparties, unnecessarily delay or withhold the case from being properly tried before the High Court, and promote speedy and expeditious determination of suits at trial. A purposive reading of the amendments conclude that the amendments to the CJA 1964 should have a retrospective effect.* Hence, appeal 360 (which was filed after the cut-off date) was indubitably incompetent and must be struck out *in limine*. [see p 129 para 13; p 130 para 17; p 132 para 24; p 134 para 27]

(b) Even assuming that the court was wrong in the retrospective operation of the amendments, *a literal and prospective application of the same amendments would still veer in favour of the respondents' preliminary objection since a substantive amendment that would remove a party's specific right to an interlocutory appeal against the dismissal of a*

A *striking out application would not curtail a party's right to be heard or defend against an action as that party would still have their day in court for trial.*
…

2. *It was never the intention of the legislator to vest an absolute right of appeal to every decision or order made by the High Court to the Court of Appeal (despite such right being a substantive right). The legislator has intended for the right of appeal under s. 67 of the CJA to have its own set of limitations, restrictions or qualification reflected in s. 68 of the CJA. It cannot be said that the appellant would be prejudiced, as its right to appeal and right to be heard at trial remained intact. A grave injustice, would ensue when there is unjust deprivation of the right to appeal against a decision of the High Court after full trial. However, such injustice cannot be implied upon the Amendment Act's restriction on an appeal against a decision by the High Court to dismiss a striking out application. [see p 130 para 18 - p 131 para 18; p 134 para 30 - p 135 para 31; p 136 para 34]* (emphasis added)

[35] The facts in the above case are on all fours with the present case where the plaintiffs' application to strike out the civil suit at the HC was dismissed by this court. The application in encl. 26 of the civil suit was heard prior to the coming into force of the amendments and the decision was delivered after 1 October 2022. This court subscribed to the CoA views above that an appellant would not be prejudiced, as its right to appeal and right to be heard at trial remained intact. However, a grave injustice would ensue when there is deprivation of the right to appeal against a decision of the HC after full trial. In regard to the position of a plaintiff whose case was struck off, or a defendant upon whom a summary judgment or judgment in default was entered, they have the right to appeal that decision because such decisions would have the effect of totally ending the claim. The trial would not proceed and the judgment is final. That would be discrimination if Parliament was to legislate that there be no right to appeal against the summary judgment, striking out and judgment in default orders granted by the original court. Therefore, the plaintiffs' arguments that they have been discriminated against have no standing in view of the policy decision behind the amendments' enactment.

[36] In *Nor Hazliza*'s case (*supra*), although the decision of the HC to reinstate the plaintiff's claim was reversed by the CoA, Wong Khian Keong JCA stated:

> [58] With respect to the plaintiff's learned counsel, I am of the view that the High Court's decision (reinstatement of this suit) falls within the definition of "decision" in s. 3 of the CJA. This is because if this appeal is allowed by the Court of Appeal, this suit will be struck out. In such an event, the rights of the plaintiff are finally disposed of within the meaning of s. 3 of the CJA. Accordingly: (i) the High Court's decision (reinstatement of this suit) constitutes an "order" under s. 3 of the CJA which is appealable to the Court of Appeal pursuant to s. 67(1) of the CJA;
>
> …

[61] I agree with the reasons expressed in Hashim Hamzah JCA's judgment that this appeal is not barred by the new s. 68(1)(f) of the CJA. According to Hashim Hamzah JCA, among others:

(i) section 28(1)(a) to (d) of the CJA curtail the right of parties to appeal to the High Court (High Court's appellate civil jurisdiction) against decisions of "subordinate courts" (defined in s. 3 of the CJA) which involve the exercise of the original jurisdiction of the subordinate courts;

(ii) section 68(1)(a) to (g) of the CJA restrict the right of parties to appeal to the Court of Appeal (Court of Appeal's appellate civil jurisdiction) in respect of decisions made by the High Court in the invocation of the High Court's original jurisdiction. The term "application" employed in s. 68(1)(f) of the CJA makes it clear that Parliament only intends to curtail parties' right to appeal to the Court of Appeal against decisions of the High Court with regard to "applications" which have been filed in the High Court (not in the subordinate courts); …

[37] The facts in *Nor Hazliza*'s case (*supra*) can be found in the judgment of the learned Judicial Commissioner, Kenneth St James:

[3] Here, the defendants in the Sessions Court suit filed an application to strike out the plaintiff's writ and statement of claim. The Sessions Court allowed their application. The plaintiff appealed to the High Court. I allowed the plaintiff's appeal, that is, I reversed the decision of the Sessions Court. Effectively, I dismissed the defendants' application to strike out.

…

[15] The latest amendments to sub-s. 68(1) [CJA] curtail appeals or further appeals to the Court of Appeal. The latest equivalent amendments to sub-s. 28(1) [CJA] have the same corresponding purpose of curbing appeals from the Subordinate Courts to the High Court. *The rationale or purpose is so that the appellate courts are not further inundated with these interlocutory appeals (summary judgment, striking out and setting aside of a default judgment).*

[16] The parties get one opportunity or attempt at persuading the first instance court to grant summary judgment, to strike out a suit or pleading, or to sustain a default judgment. And if the first instance court does not grant summary judgment, does not strike out the suit or a pleading, or does not sustain a default judgment then the parties have to go to trial to determine their dispute. (emphasis added)

[38] It was submitted by the plaintiffs that the convenience of the court is not a valid reason for the amendments to the CJA to curtail the rights of the litigants for their day in the appellate court against the decision of the HC. They said it was a lame reason. And added then by right, Parliament should repeal the right to file interlocutory applications *per se*. However, I agreed with the learned JC's rationale in *Nor Hazliza*'s case that:

A

> [18] These interlocutories – summary judgment, striking out and setting aside a default judgment – are the exceptions, rather than the rule. The rule is to go to trial. **This is because the trial process is the essence and the bedrock of our legal process.** (emphasis added)

[39] The plaintiffs referred to the case of *Danaharta Urus Sdn Bhd* B *v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 MLJ 257 in support of its contention that the amendments to the CJA were discriminatory in nature. But it must be borne in mind that there, the FC had in fact overturned the decision of the CoA which held that s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 was unconstitutional as it contravened art. 8(1). C Kekatong had applied to the HC seeking to restrain Danaharta from exercising any rights under the Act or under the vesting order and with particular regard to s. 57 of the Act and para. 5 of the Fifteenth Schedule to the National Land Code ('the NLC'). The HC refused the injunction on the basis that there was no serious question to be tried and in any event, it had no jurisdiction to grant an injunction by reason of s. 72 of the Act. The CoA D reversed the HC decision. The FC held, allowing the appeal of Danaharta:

> [3] That clearly is the purpose of s. 72 which applies to all persons in the same position as the respondent. Thus it applied equally to all persons who were similarly circumstanced. This was a reference to all persons whose assets and liabilities had been acquired by the appellant pursuant E to the Act. Surely it could not include the appellant itself for reasons which were too plain to state (see para 59).
>
> [4] The law that the Federal Court referred to thus far made it clear beyond doubt that there would be a violation of art. 8(1) only if a legislation does not apply to a person who is similarly circumstanced as F the other persons in the classification – and not to someone like the appellant outside it. The conclusion of the Court of Appeal was therefore wholly unsustainable as it was a total deviation from the law regulating art. 8(1). It was therefore the Federal Court judges' unanimous view that there was a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of G the reasonable classification test and is not unconstitutional (see para 59).

[40] The burden of proof in a constitutional challenge such as this case is on the plaintiffs to prove that the provision is unconstitutional. In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, Zainun Ali FCJ (as Her Ladyship then was) H at p. 560 (CLJ); p. 294 (MLJ) held:

> [93] The preliminary position is that there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action. *The burden is upon him who challenges the provision* I *to show that they are unconstitutional* (*Public Prosecutor v. Pung Chen Choon* [1994] 1 MLJ 566, *Ooi Kean Thong & Anor v. Public Prosecutor* [2006] 3 MLJ 389, *Public Prosecutor v. Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ

921). *The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid.*

(emphasis added)

[41] The burden of proof upon the plaintiff is not an easy one to be discharged simply by averring that they had been inconvenienced to have to go through the whole trial and that they were discriminated upon. The plaintiffs urged the court that the defendants had not exhibited minutes of meetings *etc*, to support their justification for the amendments to the CJA. Nevertheless, this court opines it is trite law that it is not for the defendants to prove the case for the plaintiffs. The court's function is to test the legality of the defendants' actions against principles and standards of the Constitution. The "reasonable classification test" was elegantly explained by the FC in the case of *Mohd Najib Hj Abd Razak v. Government Of Malaysia & Another Appeal* [2023] 10 CLJ 329; [2023] 6 MLJ 483. In that case, the FC held that art. 8(1) of the Federal Constitution permitted reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question. This is the test of constitutionality under art. 8. Hence, a law may not discriminate for or against a person or class unless there is a rational basis for such discrimination. Her Ladyship Nallini Pathmanathan FCJ stated:

[224] This is because where the Government acts in its public capacity and in the exercise of its ordinary governmental functions, a subject, such as the appellants, cannot claim equality with the Government (see Amraoti Electric Supply Co Ltd v. NH Mujumdar ILR (1952) Nag 830; AIR 1953 Nag 35). The function of levying tax is a sovereign function of the Government and cannot therefore be treated as a private function of the Government so as to make it a 'person' within the meaning of art. 8 of the FC (see *RM Seshadri v. Second Additional Income-Tax Officer, Salaries Circle, Madras and another* (1954) 2 MLJ 285; ILR (1954) Mad 1236; AIR 1954 Mad 806), as the appellants seek to do here.

[225] This contention is not therefore available to the appellants as the respondent in levying tax on them is carrying out its public function and is in that context not a 'person' within art. 8 of the FC.

[226] Secondly, the Inland Revenue is levying tax on the appellants in the same manner that it does for all citizens of the nation. The appellants have not been singled out for discriminatory treatment nor treated in a manner not provided for in the ITA. There is no evidential basis on record to support such a contention. Accordingly, there is no basis for the contention that there has been a contravention of art. 8 of the FC.

[227] The second limb of the test stipulates that the intelligible differentia must have a rational relation to the object sought to be achieved by the statute. Here the ITA has the object of ensuring that taxes are collected efficiently and expeditiously in the interests of the citizens of the nation as a whole s. 106(3) of the ITA as we have construed it, serves that object

most rationally. It has a rational relation to the collection of taxes efficiently and expeditiously in that it serves to ensure that for the purposes of enforcement s. 106(3) of the ITA precludes matters which are deferred to the dispute resolution mode specified in the statute. Therefore, it satisfies that aspect of the test for art. 8 of the FC too. It passes the constitutional validity test. (emphasis added)

[42] Pursuant to the amendments made by Act 1661, the new s. 68(1) of the CJA reads:

68. (1) No appeal shall be brought to the Court of Appeal in any of the following cases:

…

(e) where a High Court dismissed any application for a summary judgment;

(f) where a High Court dismissed any application to strike out any writ or pleading; and

(g) where a High Court allowed any application to set aside a judgment in default.

[43] The amendments to include three new non-appealable matters from the HC to the CoA have been clearly explained in the policy speech of the Minister on 25 July 2022, which was to "… hanya kes yang mempunyai merit sahaja yang akan didengarkan di Mahkamah Rayuan, dan menjadikan pentadbiran kehakiman lebih efektif dan masa serta kos pihak-pihak yang terlibat kini dapat dijimatkan tanpa menjejaskan keadilan dan hak mana-mana pihak." Parties would still be able to pursue and argue their cases in full during the trial even if a striking out application was dismissed by the HC. Therefore, guided by the FC decision above this court has determined that the intelligible differentia which must have a rational relation to the object sought to be achieved by the statute, in the present case, is that s. 67 of the CJA which provides for the substantive right of appeal has the object of ensuring, as a whole, would not be hampered by appeals on the three types of interlocutory matters which merits would be fully ventilated in a full trial. Hence, the amendments to s. 68(1) would ensure that only interlocutory applications and cases that have merits would be heard by the CoA; hearing on the merits rather than on technicalities. Subsections 68(1)(e), (f) and (g) served that object most rationally. This court opined that the amendments to s. 68(1) of the CJA satisfied the test for art. 8(1) of the Federal Constitution.

[44] The CoA in *Azinal*'s case (*supra*) also touched upon the purposive approach when commenting on the appellant's interpretation of Act 1661 wherein it stated:

This purposive approach has now been given statutory recognition by our Parliament enacting s. 17A in the Interpretation Acts 1948 and 1967 (Act 388) ("the Acts") which reads: "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying

the Act (WHETHER THAT PURPOSE OR OBJECT IS EXPRESSLY STATED IN THE ACT OR NOT) shall be preferred to a construction that would not promote that purpose or object."

[45] The CoA continued in respect of the rationale for the amendments:

[24] To our minds, the appellant's interpretation of the Amendment Act (leading to the prospective effect of the amendment) would grossly undermine, defeat, and flout the very purposes and objectives that the amendment was seeking to achieve. Those main purposes and objectives being:

(a) To curtail the abuse of interlocutory appeals as a tactic to unnecessarily protract litigation, exhaust counterparties, and to unnecessarily delay or withhold the case from being properly tried before the High Court;

(b) To promote speedy and expeditious determination of suits at trial (without being protracted by unnecessary interlocutory appeals); and

(c) To gradually alleviate the backlog in the Court of Appeal and to avoid the undesirable situation of the Court of Appeal being further overladen and inundated with further filings of interlocutory appeals after the cut-off date of October 1, 2022.

[46] Upon a perusal of the affidavits in this application, this court agreed with the defendants' contention that at all material times, the plaintiffs did not raise any challenge against the legislative procedure in the enactment of the Act A1661. Moreover, the plaintiffs admitted that their challenge only revolved around the contention that the amendments to ss. 28 and 68 of the CJA were unconstitutional as stated in plaintiffs' affidavit in reply (encl. 4 at para. 10) where the deponent stated "… Saya juga menyatakan bahawa kes ini adalah dihujahkan di atas alasan bahawa pindaan yang dilakukan adalah tidak berperlembagaan, dan segala isu prosedur dan kelulusan yang dibangkitkan oleh defendan-defendan adalah tidak relevan." Hence, the court found that there was no procedural error(s) in the enactment of the Act A1661 as a valid law.

[47] At this point, the court needs to address the issue of the difference between a "decision" and a "ruling" as the plaintiffs had also argued the case of the court was also asked to declare that the FC in the case of *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153 had "misinterpreted" s. 3 of the CJA and that this court should follow the decision of the FC in *Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd* [2019] 4 CLJ 131. This is because, the plaintiffs submitted that the FC had "added words which were not there" in the *Asia Pacific* case (*supra*). The FC rulings in these two cases meant that "judgments" or "orders" which do not finally dispose of the rights of the parties were not to be appealed and the position has changed after 22 years since the decision in *Dalip Bhagwan*

Singh v. PP [1997] 4 CLJ 645. It was submitted further that the amendment in s. 3 of the CJA was only about rulings on documents but did not include decisions. Therefore, interlocutory decisions in civil cases should not be considered as rulings. In *Dalip Bhagwan Singh*, the Federal Court stated:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

[48] The FC discussed ss. 3 and 67(1) of the CJA and the word "decision" in the case of *Kempadang Bersatu,* where it held that:

> Construction Of Subsection 67(1) Of The CJA
>
> [25] Subsection 67(1) is a general provision conferring jurisdiction on the Court of Appeal to hear and determine appeals against the decision of the High Courts. *It states that "any judgment or order" of the High Court which is made in the exercise of its original or of its appellate jurisdiction is appealable. However this right of appeal is always subject to any statutory provisions in the CJA or other statutes limiting appeals.* On this basis, the provision of s. 67(1) of the CJA is to be read together with the provisions in the CJA and other statutes which impose terms and conditions of an appeal.
>
> [26] Civil matters which are not appealable to the Court of Appeal are listed in sub-s. 68(1). For instance, there can be no appeal against a judgment or order made by consent of parties or a judgment or order which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of s. 3 of the CJA when it qualifies the word "decision" as opposed to a "ruling" of the court.
>
> [27] Section 3 is not a specific provision limiting appeals. Section 3 is the interpretation section of the CJA. It merely defines what a decision is, for the purpose of the CJA.
>
> *[28] On the interpretation of the word "decision", the relevant paragraph in s. 3 is divided into two parts. The first part identifies "decision" in the form of "judgment, sentence or order" of the court. It provides an extensional definition of the word decision by listing instances of the set of things included therein. In other words the concept of decision is not explained but the objects that fall under this word are listed.*
>
> *[29] The second part of the paragraph qualifies that these forms of decision do not include "any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties". It is noted that the second part was inserted in s. 3 by Act A1031 which came into effect on 31 July 1998. Based on the said provision, at what juncture a ruling is issued plays a vital role in determining whether such an order is a ruling within the context of s. 3. There must be a trial in existence or a hearing and that the order is issued in the course of that trial or hearing. Secondly, the ruling must not have the effect of disposing the final rights of the parties.*
>
> …

[31] In the absence of the word "decision" in sub-s. 67(1) of the CJA, the question is whether the phrase "judgment or order" mentioned in sub-s. 67(1) of the CJA is a "decision" within the context of s. 3 of the CJA. Putting it in another way, the question is whether the exception provided in s. 3, which excludes a "ruling" from the meaning of decision, should be extended to s. 67(1), thus restricting any appeal to be filed against any ruling of the High Court?

(emphasis added)

[49] The FC continued further in the *Kempadang Bersatu* case (*supra*) that:

[50] However it must be stated that not all orders given by the court pursuant to interlocutory applications filed by parties in the course of trial are non-appealable. In *Mulpha International Bhd & Ors v. Mula Holdings Sdn Bhd & Ors & Another Appeal* [2017] 1 LNS 622; [2017] MLJU 445, it was held that the decision of the trial judge dismissing an application to strike out pleadings under O. 18 r. 19 of the Rules of Court 2012, was not a ruling within the context of s. 3 of the CJA although such application was filed in the course of the trial.

[51] On this issue, the Court of Appeal applied a purposive approach in interpreting the phrase "in the course of trial or hearing" provided in s. 3 of the CJA. Upon a perusal of the explanatory statement to the Bill of Amending Act A1031, the court concluded that the amendment made to s. 3 of the CJA sought to overcome the delay in the completion of a trial as a result of appeals filed against rulings of a trial judge with respect to admissibility of "any evidence or document".

[52] It was then held that the word "ruling" in the context of s. 3 of the CJA is to be limited to an objection raised by a party in the course of trial with regard to the admission of any evidence or document.

[53] Abdul Rahman Sebli JCA *in Mulpha Trading* (*supra*) held that:

The word "ruling" appearing in section 3 of the CJA is not defined but in our view it refers to any ruling made in the course of a trial upon objection raised by any party to the proceedings. An example would be an objection to the admissibility of any evidence or document.

[17] A decision by the trial judge to either uphold or overrule the objection would be a "ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties." Such decision is not a "judgment" or "order" within the meaning of section 67(1) read with section 3 of the CJA and is therefore not appealable. On the other hand, a decision made pursuant to an application under Order 18 rule 19 of the Rules is not such "ruling".

…

[54] It is noted that in Christopher Anak Bandi (supra), the Court of Appeal held that an application to amend pleadings filed in the course of a trial is a ruling within the context of s. 3 and is thus non appealable. It was held that one needs to merely look at the provision of s. 3 of the CJA with respect to the two requirements of a ruling which renders it non appealable.

A [55] Nevertheless, the decision of the court in *Christopher Anak Bandi* (*supra*) must not be overstated. At the risk of repetition, the facts in *Christopher Anak Bandi* (*supra*) involved an application made by the plaintiff to amend its pleading in the course of trial. On this, the decision of the Court of Appeal was also made in the light of a recent decision of the Federal Court in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* B [2015] 8 CLJ 1 which displaces the principles enunciated in *Yamaha Motor Co. Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, on amendment of pleadings, if such application is made at a later stage of proceedings. (emphasis added)

[50] The full citation of *Christopher Bandi* referred to above is *Christopher* C *Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party)* [2016] 4 CLJ 831. *Kempadang Bersatu* case also referred to *Mulpha Trading* case. The latter case (*Mulpha Trading*) now to a certain extent would be overruled in light of the amendments to the CJA that made an O. 18 r. 19 application not appealable when it is dismissed by the HC.

D **[51]** In the *Asia Pacific* case (*supra*), the FC held, allowing the appeal with costs held the following:

(1) (per Azahar Mohamed CJM, supporting) The doctrine of *stare decisis* dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. However, there are E exceptional circumstances that allow it to depart from the earlier decision, but such power must be used sparingly. It is important to note that in *Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614 ('*Kempadang*'s case') concerns the interpretation of a statutory provision, namely s. 67(1) of the CJA. *In the present appeal, it is important* F *not to depart from Kempadang's case primarily because the rules of statutory interpretation have been well applied by Justice Zainun Ali in that case. Hence, the judgment in Kempadang's case, which is the decision of this court, represents the law on the subject matter as it should be applied today* (see paras 13 & 17-18)

(2) (per Azahar Mohamed CJM, supporting and Idrus Harun FCJ, majority) The right to appeal in civil matters under s. 67 of the CJA is G subject to the definition of 'decision' as found in s. 3 of the CJA. Although s. 67(1) of the CJA provides that the Court of Appeal has jurisdiction to determine appeals from any 'judgment' or 'order' of any High Court in civil matters, it is clear from a plain reading of s. 3 of the CJA that a 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of H the parties. Further, the Federal Court in *Kempadang*'s case held that it was clear and unambiguous that the definition of 'decision' as per s. 3 was applicable to civil appeals inasmuch as it applied to criminal appeals. *Hence, the uncertainty on whether s. 3 applied to civil appeals in the absence of the word 'decision' in s. 67(1) has been laid to rest in Kempadang's case where the Federal* I *Court held that the principles underlying the application of s. 3 in criminal appeals were applicable in civil appeals. The decision is a clear authority to support the proposition that s. 67(1) read with s. 3 and s. 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made*

in the course of trial that does not finally dispose of the rights of parties. Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of 'decision' in s. 3 of the CJA and thereby appeal against every decision of trial court, which would indisputably delay the administration of justice. At the same time it is important to realise that reading s. 68 with s. 3 of the CJA to limit the jurisdiction of the Court of Appeal to hear and determine civil appeals would accord with the constitutionally entrenched principle that the Court of Appeal's jurisdiction is intended to be narrowly defined. As such, the reason for reading the additional exclusion to the jurisdiction of the Court of Appeal is within the four corners of the Act in the form of the definitions of 'decision', 'cause', 'matter', 'action' and 'proceeding' as well as the presence of the words 'judgment' and 'order' in the definition of 'decision' and ss. 67-68 of the Act. On the other hand, declining to read s. 3 as instilling an additional exclusion of the appellate jurisdiction of the Court of Appeal would offend the rule that permits additional words to be read into statutory provisions to prevent an absurdity from resulting. As such, the decision made by the High Court in the amendment application was not appealable. Since the decision of the High Court in the amendment application was not appealable, the defendants' appeal against the decision of the High Court was incompetent and not properly brought before the Court of Appeal. Therefore, the Court of Appeal had no jurisdiction to hear and determine the appeal and it committed a jurisdictional error when it heard the appeal (see paras. 6, 11, 19, 101, 115-116, 135, 137 & 139) … (emphasis added)

[52] Having perused the two cases above, this is this court's take on the principles enunciated therein (collectively):

(i) *Asia Pacific* case (2020) – The FC stated that the exclusion of appeals against non-final decisions, is clearly intended to apply to both civil and criminal appeals and to achieve that overarching objective, it would be convenient to enact one common provision that would apply to both types of appeals;

(ii) *Kempadang Bersatu* case (2019) – The finality of the decision is in the effect of the decision or order. There, the JC's decision was the final order, hence the decision was non-appealable; and

(iii) the decision of the FC in *Asia Pacific* case was in line with the decision of the FC in *Kempadang Bersatu* case.

[53] I have concluded that the application in encl. 1 must be dismissed as the plaintiffs have not been able to satisfy the art. 8(1) test. Before I move on to the next issue, I would just point out the similarities in the policy decision made when s. 3 of the CJA was being amended. This point was brought up in the *Kempadang Bersatu* case where the FC stated:

[38] The position on the amended s. 3 of the CJA has been clearly set out in the decision of the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625 (see also *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v. Public Prosecutor* [2014] 6 MLJ 831).

[39] In the case of *Dato' Seri Anwar Ibrahim* at p. 595 (MLJ); p. 636 (CLJ) the court pointed out the underlying reasons for the amendment to the definition of 'decision' in s. 3 of the CJA which came into effect on 31 July 1998 in the following manner:

> The underlying reason behind the amendment to the definition of 'decision' in s. 3 of the CJA is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. Apart from that, the definition of 'decision' by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve as evident from the explanatory statement to the Bill which reads:
>
> 2. Clause 2 seeks to amend section 3 of Act 91.
>
> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.
>
> *Quite apart from the explanatory statement to the Bill the definition of 'decision' by itself, to our mind, is sufficiently clear, and it is the duty of the court to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.* (emphasis added)

Appeal Is Not As Of Right

[54] The defendants submitted that the right to appeal is not a substantive right if it is not provided for in any written law. NH Chan JCA (as His Lordship then was) in the case of *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 held:

> As said by Lord Goddard CJ in *R v. West Kent Quarter Sessions Appeal Committee* [1951] 2 All ER 728, at 730:
>
> > It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute …

[55] Many years later, Ariffin Zakaria FCJ (as His Lordship then was) in *Wan Sagar Wan Embong v. Harun Taib* [2008] 5 CLJ 14; [2008] 4 MLJ 473, stated:

> [7] We agree with the respondent that an appeal is maintainable where statute and rules of procedure provide for it. Appeal is a right created by statute and the courts cannot create or take away such a right ...

[56] Recently, in *Azinal*'s case (*supra*), the CoA in para. 16 that:

> [16] It must be noted that prior to the enforcement of Act 1661, matters which are non-appealable to the Court of Appeal were spelt out under s. 68(1)(a) to (d) of the CJA 1964. Sections 68(1) of the CJA 1964 has clearly prescribed that (in so far as right of appeal to the Court of Appeal is concerned) the right of appeal against any decision or order of the High Court created by s. 67 of the CJA 1964 is NOT A BLANKET RIGHT OF APPEAL. Section 68 of the CJA 1964 clearly prescribed that this conferred right of appeal must be read conjunctively or in tandem with the restrictions imposed by s. 68 of the CJA 1964.
>
> [17] Essentially, the right of appeal conferred *via* s. 67 of the CJA 1964 shall be subject to the restrictions or qualifications stipulated under s. 68 of the CJA 1964.

[57] Still on the issue of the plaintiffs' purported automatic right to appeal, this court agreed with the defendants's submissions that it is not as of right. It is subject to the provisions of the law. In fact, s. 3 of the CJA has excluded the interlocutory orders and/or judgments from the definition of "decision" as we have seen in the decisions of the FC above. Premised upon the above consideration and case laws, this court found that the impugned provisions (amendments) did not in any way infringe on the plaintiffs' fundamental right as they had not acquired a right to appeal to begin with in regard to interlocutory application in the nature of a striking out of a writ or pleadings.

Violation Of Art. 5 (1) And/Or Art. 10(1)(a) And 10(2)(a) Of The FC

[58] Article 5(1) of FC provides that "No person shall be deprived of his life or personal liberty save in accordance with law." The Federal Court in the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] 3 MLJ 72 defined "life" and "personal liberty" at pp. 136 to 137 (CLJ); p. 100 (MLJ):

> First, art 5(1) speaks of 'life' and 'personal liberty' and guarantees that a person's life and personal liberty are not to be deprived save in accordance with law.
>
> ...
>
> In our view, the words 'personal liberty' should be given the meaning in the context of art. 5 as a whole. In this respect, we adopt what has been said by Suffian LP in *Loh Wai Kong*. Speaking for the Federal Court, comprising five Federal Court judges in deciding whether a citizen has a right to leave the country, to travel overseas, and a right to a passport, this is what he said (at p 34):

A Article 5(1) speaks of personal liberty, not of liberty *simpliciter*.

… It is well settled that the meaning of words used in any portion of a statute – and the same principle applies to a constitution – depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing 'personal liberty' in art. 5(1) one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except any enemy alien, freedom from being 'unlawfully detained'; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to have a passport. Indeed freedom of movement is dealt with specifically in art. 9 which, however, only guarantees citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein.

[59] On the other hand, in the FC case of *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750, Nallini Pathmanathan JCA (as Her Ladyship then was) stated:

The Construction Afforded To Art 5(1) Of The FC

[397] Article 5(1) of the FC more particularly 'life' was, in the course of the evolution of our constitutional law, construed in a limited sense, so as not to include livelihood. But the narrowness of this construction was put to rest by the generous construction afforded to this article in, *inter alia*, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 per Gopal Sri Ram JCA (later FCJ) where the right to education was accepted as a part of the right to life, and again the decision of the Court of Appeal in Sugumar Balakrishnan per Gopal Sri Ram JCA (later FCJ) where the right to earn a livelihood and thereby the right to travel to, and remain at the place of work, was further recognized as a right to livelihood falling within the purview of art. 5(1) of the FC. A series of subsequent cases, including the right to a livelihood and the right to a fair trial, have all contributed to building up on the body of rights encompassed within the few precious words of art. 5(1) of the FC, namely the 'right to life'.

> [399] However, the move away from a restricted approach to the construction of art. 5(1) of the FC represents one of the most important developments in constitutional law in our legal history. The rectitude of such a construction cannot be denied because the right to life means the right to live with basic human dignity, which is the purport of the Federal Constitution particularly in relation to fundamental liberties.
>
> …
>
> *[401] However, these rights, although fundamental, are subject to restriction on the grounds as set out in the FC. Compendiously, such restrictions may be described as being in the public interest or protection. In short, individual liberty is subordinated to public or social interests as expressly provided for in the provisions of the FC.*
> (emphasis added)

[60] Coming back to *Mohd Najib Hj Abd Razak*'s case, the FC held that s. 106(3) of the Income Tax Act was constitutional and cannot be said to encroach upon judicial power nor contravene art. 5(1) of the FC in terms of the right to a fair trial or access to justice. The FC rationalised that judicial power is inherent in the taxation process and is neither abrogated, removed nor suspended (refer to para. 214).

[61] Earlier, I have set out the provisions of arts. 10(1)(a) and (2)(a) and have no wish to reproduce it here again. Suffice to say, the plaintiffs were also unable to prove that the relevant provisions of art. 10 had been violated by the 2022 amendments to the CJA. Following the precedents of the FC aforementioned, this court also found that art. 5(1) had not been violated by Act 1661. The learned Senior Federal Counsel submitted that art. 5(1) did not at all associate with the right to appeal against the refusal of an application for the striking out a civil suit but only referred to freedom from being unlawfully detained and/or basic right as a human being. He contended that the amendments to CJA obviously did not violate any rights relating to the person or body of the individual. Thus, the plaintiffs' arguments premised on art. 5(1) of the FC was misconceived. This court opined that even if the meaning of the "right to livelihood" is given a generous construction, as was in the case of *Tan Tek Seng* (*supra*), nevertheless, these rights, although fundamental, are subject to restriction on the grounds as set out in the FC. Therefore, the plaintiffs' claim in this respect also failed.

The Applicability Of Art. 162 Of The Federal Constitution

[62] Lastly, the plaintiffs prayed for an order that the 2022 amendments be repealed under the provisions of arts. 162(6) and 162(7) of the Federal Constitution. Article 162 provides:

> Existing laws 162.
>
> (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after

Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.

…

(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

(7) In this Article "modification" includes amendment, adaptation and repeal.

[63] The defendants referred the court to the FC case of *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347; [2009] 4 MLJ 593 where it was held:

> [12] That being the case, it is clear that art 63 of the Perak Constitution, being a pre-Merdeka written law, falls within the meaning of 'federal law' and therefore, an 'existing law' as defined in Federal Constitution. Thus it continues in force on or after Merdeka Day subject to any amendments made by State law. …

[64] Article 162 as set out above clearly referred to existing laws passed prior to the enactment of the Federal Constitution, *ie*, pre-Merdeka laws. There is simply no basis for this argument by the plaintiffs.

Conclusion

[65] Premised upon the above considerations, this court found that the plaintiffs have failed to prove that there had been a clear transgression of constitutional principles in the enactment of Act 1661. Therefore, encl. 1 was dismissed with costs.